Office - Supreme Court, U.S.
FILED
JUN 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND AMICUS CURIAE BRIEF OF THE CALIFORNIA LAND TITLE ASSOCIATION

In Support of Petitioner On Writ of Certiorari To the Supreme Court of California

EDGAR B. WASHBURN
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
Telephone: (415) 981-2121
Counsel for Amicus Curiae

Of Counsel:
NANCY J. STIVERS
WASHBURN & KEMP
One Embarcadero Center
Suite 2407
San Francisco, CA 94111

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
Motion for leave to file brief as amicus curiae	1
I	
CLTA's interest in this proceeding	2
II	
The proposed amicus curiae brief	3
III	
Conclusion	4
Amicus curiae brief of the California Land Title Association	1
I	
The interest of the California Land Title Association	1
A. The decision effectively transfers ownership of wetlands within federally-patented Mexican land grants to the State of California	3
B. The decision creates instability in title to 8½ million acres of federally-patented Mexican land grants	5
C. The decision sanctions further extensions of the public trust by rejecting the boundaries of state sovereign ownership as a limitation on the scope of the trust	8
II	
Summary of argument	12
III	
Argument	15
A. As against the State of California, a patent issued pursuant to the 1851 Act is not merely confirmatory, but conclusive	15

TABLE OF CONTENTS

Page

B. The decision below unconstitutionally appropriates valuable property rights through an abrupt and unforeseeable change in real property law 20

IV

Conclusion 30

TABLE OF AUTHORITIES CITED

Cases

	Page
Attorney General v. Richards, 8 Anst. (Eng.) 603 (1795)	9
Atwood v. Hammond, 4 Cal.2d 31, 48 P.2d 20 (1935)	4
Barker v. Harvey, 181 U.S. 481 (1901)	2, 7, 21, 22, 24
Beard v. Federy, 70 U.S. (3 Wall.) 478 (1866)	2, 16, 17
Berkeley v. Superior Court, 26 Cal.3d 515, 606 P.2d 362, cert. denied, 449 U.S. 48 (1980)	25
Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928)	3
Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339 (1909)	19
California ex rel. State Lands Commission v. United States, 457 U.S. 273 (1982)	10
California Powder Works v. Davis, 151 U.S. 389 (1893)	16
Cassidy v. Carr, 48 Cal. 339 (1874)	21
Chipley v. Farris, 45 Cal. 527 (1873)	21
Crystal Springs Land & Water Co. v. Los Angeles, 177 U.S. 169 (1900)	16, 19
Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944)	28
Devine v. Los Angeles, 202 U.S. 313 (1906)	19
Estrada v. Murphy, 19 Cal. 248 (1861)	2, 22
French v. Fyan, 93 U.S. (3 Otto) 169 (1876)	8
Harvey v. Barker, 126 Cal. 262, 58 P. 692 (1899), aff'd sub. nom. Barker v. Harvey, 181 U.S. 481 (1901)	2, 22, 24
Heath v. Wallace, 138 U.S. 573 (1891)	8
Henshaw v. Bissell, 85 U.S. (18 Wall.) 255 (1873)	16
Hooker v. Los Angeles, 188 U.S. 314 (1903)	19
Hughes v. Washington, 389 U.S. 290 (1967)	26, 27, 28

Table of Authorities Cited

Cases

	Page
Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892)	9
Johnson v. Drew, 171 U.S. 94 (1898)	8
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	18, 27, 28
Knight v. United Land Assn., 142 U.S. 161 (1891)	2, 16, 17, 18, 20
Knudson v. Kearney, 171 Cal. 250, 152 P. 541 (1915)	25
Leese v. Clark, 18 Cal. 535 (1861)	21, 22, 23
Leo Sheep Co. v. United States, 440 U.S. 668 (1979)	28
Long Beach v. Mansell, 3 Cal.3d 462, 476 P.2d 423 (1970)	4
Los Angeles v. Venice Peninsula Properties, 31 Cal.3d 288, 644 P.2d 792 (1982)	passim
Los Angeles Athletic Club v. Long Beach, 128 Cal.App. 427, 17 P.2d 1061 (1932)	4
Los Angeles Farming & Milling Co. v. Los Angeles, 217 U.S. 217 (1910)	16, 19, 20
Los Angeles Farming & Milling Co. v. Thompson, 117 Cal. 594, 49 P. 714 (1897), aff'd sub nom. Thompson v. Los Angeles Farming & Milling Co., 180 U.S. 71 (1901)	21
Mallon v. Long Beach, 44 Cal.2d 199, 282 P.2d 481 (1955)	3
Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374 (1971)	4
Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)	9
Miller v. Dale, 20 U.S. (2 Otto) 473 (1876)	16
Moore v. Smaw, 17 Cal. 199 (1861)	21
Moore v. Wilkinson, 13 Cal. 478 (1859)	21

Table of Authorities Cited

Cases

Page

Muhlker v. New York & Harlem R.R. Co., 197 U.S. 544 (1905) 28

National Audubon Society v. Superior Court, 33 Cal.3d 419, 658 P.2d 709 (1983) 12, 26

Parmeter v. Attorney General, 10 Price (Eng.) 418 (1813) 9

People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913) 3

People v. Long Beach, 51 Cal.2d 875, 338 P.2d 177 (1959) 4

People v. San Francisco, 75 Cal. 388, 17 P. 522 (1888) 21, 23, 24

Rodriguez v. United States, 68 U.S. (1 Wall.) 582 (1864) 16

San Francisco v. LeRoy, 138 U.S. 656 (1891) 2, 17, 20

Shively v. Bowlby, 152 U.S. 1 (1894) 9

State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1972) 10

State of California v. Leslie Salt Co., Alameda County Superior Court No. 463631-9 (Consolidated) 11

State of California v. Superior Court (Lyon), 29 Cal. 3d 210, 625 P.2d 239 cert. denied, 454 U.S. 1094 (1981) 26

Steel v. St. Louis Smelting & Refining Co., 106 U.S. (16 Otto) 447 (1882) 8

Teschemacher v. Thompson, 18 Cal. 11 (1861) 21, 22

Thompson v. Los Angeles Farming & Milling Co., 180 U.S. 71 (1901) 2, 21

Table of Authorities Cited

Cases

Page

United States v. Coronado Beach Co., 255 U.S. 472 (1921) 2, 7, 17, 20, 21

United States v. Holt State Bank, 270 U.S. 49 (1926) .. 10

United States v. Oregon, 295 U.S. 1 (1935) 10

United States v. Pacheco, 69 U.S. 587 (1865) 11

United States v. Title Insurance & Trust Co., 265 U.S. 472 (1924) 2, 20, 28, 29

United States v. Utah, 282 U.S. 64 (1931) 10

Waterman v. Smith, 13 Cal. 373 (1859) 16, 21

Statutes—Federal

"An Act to Ascertain and Settle Private Land Claims in the State of California," 9 Stat. 631 (1851) ("the 1851 Act") ..... passim

Arkansas Swamp Act, Act of September 28, 1850, 9 Stat. 519 11

Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 et seq. 29

Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. 29

Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq. 29

Maritime Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. § 1431 et seq. 29

National Environmental Policy Act, 42 U.S.C. § 4321 et seq. 29

Rivers and Harbors Act of 1899, 33 U.S.C. § 402 et seq. 28

Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848) Art. VIII 2

TABLE OF AUTHORITIES CITED

Statutes—State

	Page
California Civil Code, Section 830	26
California Coastal Act, Pub. Res. Code § 30000 et seq.	29
California Environmental Quality Act, Pub. Res. Code § 21000, et seq.	29
California Wetlands Preservation Act, Pub. Res. Code § 5810 et seq.	29
Cal. Pub. Res. Code:	
§ 6307	4
§ 6312	5
§ 6501-7062	4
1917 Cal. Stat. ch. 77, p. 89	25
1945 Cal. Stat. ch. 1513, p. 2826	25

Other Authorities

Cowan, R., Ranchos of California (1977)	5
Hale, De Jure Maris (c. 1670) Ch. IV, VI, Reprinted in Hargraves, "A Collection of Tracts Relative to the Law of England" (1788)	9
Laws III and VI of Title XXVIII of Las Siete Partidas	7, 10
Jones, Report on the Subject of Land Titles in California, (1850)	18

No. 82-708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The California Land Title Association ("CLTA") respectfully requests leave to file the accompanying Amicus Curiae Brief in support of Petitioner Summa Corporation.

CLTA appeared below as amicus curiae in the proceedings before the California Court of Appeal and the California Supreme Court. With the consent of all parties, CLTA filed an amicus brief in support of the Petition for Writ of Certiorari. Petitioner Summa Corporation and Respondent City of Los Angeles have consented to the filing of the accompanying brief. However, Respondent State of California refused to agree to CLTA's appearance as amicus curiae.

I

CLTA'S INTEREST IN THIS PROCEEDING

CLTA is a non-profit association whose members comprise 110 of the 139 title insurance companies doing business in California. The members of CLTA have issued thousands of policies insuring against the risk that wetlands and former wetlands within Mexican land grants patented by the United States pursuant to the Act of March 3, 1851, 9 Stat. 631, were encumbered by a "public trust" easement in favor of the State of California. These policies were issued and risks undertaken in reliance upon rules of law announced and often reiterated by both this Court and the California Supreme Court in decisions rendered over the course of a century. The decision below abruptly departs from these established rules by holding that federal patents confirming Mexican land grants implicitly reserved the burdensome public trust easement.

By insuring clear title to Mexican land grants, title companies have assumed liabilities totalling millions of dollars. As detailed in the accompanying brief, CLTA's interest in this proceeding stems from the harsh effects of the California court's holding on the investment-backed expectations of both landowners and title insurers, from the instability the decision creates in title to vast areas of federally-patented Mexican land grants, and from the distinct possibility that, unless checked by this Court, the public trust easement will be even further extended by the California court.

The title insurance business is predicated on the assumption that the risks involved in issuing an insurance policy can be determined. This is impossible where a court vacillates regarding fundamental legal premises governing property ownership. If title companies must now assume that any rule of property, no matter how firmly established, is

subject to abrupt and radical change, their ability to provide landowners with the security of a title policy will be seriously impaired. In sum, the members of CLTA have a direct and substantial stake in the outcome of this case.

II

THE PROPOSED AMICUS CURIAE BRIEF

CLTA's proposed brief as amicus curiae addresses three points which have not thus far been explored by the parties to this case.

First, the statewide ramifications of the California court's action are discussed. The impact of the decision below extends far beyond existing wetlands within Mexican land grants. The stability of title to former wetlands and even uplands has been called into question by virtue of the decision.

Second, the brief analyzes the implications of the California court's ruling that the public trust is not limited to the beds of navigable waters that the State of California acquired upon statehood under the Equal Footing Doctrine. By holding that the public trust is not an incident of sovereign title, the California court has removed the historical common law limitations on the scope of the public trust. If the decision stands, there exists no bar to further extensions of the trust to embrace waters that the State never owned and that are not even navigable.

Third, the proposed brief compares the decision below with California law as it existed until that decision was rendered. We do not agree with respondents' contention that the issues to be resolved in this case are matters of state law. In any event however, the California court's decision cannot stand because, in violation of the due process and taking clauses of the United States Constitution, it appropriates valuable property rights by suddenly and unexpectedly reversing rules long ago established in California property law.

In addition, the proposed brief reconciles two apparently conflicting lines of authority relied upon by the parties to this case—those cases holding that a patent issued pursuant to the 1851 Act is merely a confirmation of the Mexican grantee's property rights under Mexican law and those holding that the patent is conclusive as to the interest of the grantee. The failure of the court below to appreciate the distinction between these two lines of authority lies at the heart of its error in this case.

III

CONCLUSION

For many years CLTA has acted as spokesman for its members in matters affecting the stability and validity of land titles in California. In this capacity, CLTA has developed expertise in the history and legal bases of California land titles. CLTA is uniquely situated to comment upon the impact of the opinion below and its relationship to rules of law established by the decisions of this Court and the California Supreme Court. We therefore request leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

EDGAR B. WASHBURN
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
Telephone: (415) 981-2121
Counsel for Amicus Curiae

Of Counsel:
NANCY J. STIVERS
WASHBURN & KEMP
One Embarcadero Center
Suite 2407
San Francisco, CA 94111

No. 82-708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

AMICUS CURIAE BRIEF OF THE CALIFORNIA LAND TITLE ASSOCIATION

I

THE INTEREST OF THE CALIFORNIA LAND TITLE ASSOCIATION

The California Land Title Association ("CLTA") is a nonprofit association whose members comprise 110 of the 139 title insurance companies doing business in the State of California. The members of CLTA have issued thousands of policies insuring against the risk that wetlands within grants made by the Mexican government prior to the conquest of California by the United States were encumbered by a "public trust" easement in favor of the subsequently-created State of California. Because the wetlands that California acquired upon statehood under the Equal Footing Doctrine excluded all property previously

granted by Mexico,[1] title insurers concluded that the State could not legitimately claim a substantial reserved property interest in wetlands within Mexican grants that it never owned. Further, under the Act of March 3, 1851[2] the federal patents issued to confirm Mexican grants were conclusive against the United States and its successors, including the State of California.[3] Where a patent confirmed unqualified title, it was deemed unnecessary to look behind the patent to determine if it was subject to any silent reservations in favor of the State. Indeed, because the purpose of the 1851 Act was to settle and define the respective property interests of the Mexican grantees and the United States in the ceded territory,[4] and because it had been determined that all claims not presented in the federal confirmation proceedings were abandoned,[5] it seemed impossible that a claim first asserted 110 years after confirmation by a successor to the United States—the State of California—would be upheld.

Unfortunately, the members of CLTA underestimated the ingenuity of the California Supreme Court. The court conceded three points which we thought were dispositive: 1) that the public trust easement had never before been held to extend to lands the State never owned; 2) that

---

[1]Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848), Art. VIII; *Knight v. United Land Assn.*, 142 U.S. 161 (1891); *San Francisco v. LeRoy*, 138 U.S. 656 (1891); *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921).

[2]"An Act to Ascertain and Settle Private Land Claims in the State of California," 9 Stat. 631 (1851) ("the 1851 Act").

[3]1851 Act, Section 15; *Beard v. Federy*, 70 U.S. (3 Wall.) 478 (1866); *Knight v. United Land Assn.*, 142 U.S. 161 (1891); *San Francisco v. LeRoy*, 138 U.S. 656 (1891).

[4]*Thompson v. Los Angeles Farming & Milling Co.*, 180 U.S. 71 77 (1901).

[5]1851 Act, Section 13; *Harvey v. Barker*, 126 Cal. 262, 58 P. 692 (1899), *aff'd sub nom. Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924); *Estrada v. Murphy*, 19 Cal. 248 (1861).

patents issued in accordance with the 1851 Act were conclusive against the State on the issue of the grantee's title to tidelands; and 3) that claims to any "normal incident of title" were abandoned if not raised in the grant confirmation proceedings. Nonetheless, the court ruled that Mexican land grants patented without reservation under the 1851 Act were subject to a heretofore unasserted but all-pervasive public trust easement in favor of the State.

CLTA's interest in this proceeding stems from the harsh effects that the California court's decision has on property rights that were once deemed unassailable, from the instability the decision creates in titles to vast areas of federally-patented Mexican land grants, and from the fact that the decision removes the only rational limit on the scope of the public trust easement—the boundaries of sovereign state ownership—thereby leaving the State free to seek even further expansions of this paramount public servitude.

A. The Decision Effectively Transfers Ownership of Wetlands Within Federally-Patented Mexican Land Grants to the State of California

The "public trust" easement, as it has developed in California law, vests most of the attributes of property ownership in the State. The State may "enter upon and possess" trust-encumbered lands to improve them for trust-related uses. *People v. California Fish Co.*, 166 Cal. 576, 588, 138 P. 79, 84 (1913). It has virtually unfettered discretion in dictating the uses to which the lands may be put. The State's options range from prohibiting any use whatsoever to occupying the property to promote any of a vast array of public purposes.[6] Under the public trust doctrine, the

---

[6]The uses for which the State may appropriate lands subject to the trust have been held to be as varied as harbor development, and hydrocarbon, geothermal and mineral exploration and development, *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928),

State can even designate property as open space. *Marks v. Whitney*, 6 Cal.3d 251, 259-260, 491 P.2d 374, 380 (1971), one of the more recent California decisions discussing the nature of public rights in tidelands, emphasizes the propriety of this course of action:

> There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.

Thus the State, as trustee, may prohibit the fee owner from making any beneficial use whatsoever of trust-encumbered lands. It has been held that the State retains its trust powers even after the lands have been filled and improved. *Atwood v. Hammond*, 4 Cal.2d 31, 41, 48 P.2d 20, 26 (1935); *Long Beach v. Mansell*, 3 Cal.3d 462, 486-487, 476 P.2d 423, 440 (1970).

What is left to the landowner whose title is subjected to this permanent public servitude? Not much. Although theoretically he may use his lands as he sees fit until the State decides otherwise, in practice improvement of trust lands is halted until he pays "equal or greater value" to the State for termination of its trust interest.[1] Although he

---

Mallon v. Long Beach, 44 Cal.2d 199, 282 P.2d 481 (1955), Cal. Pub. Res. Code § 6501-7062; construction of a YMCA building, *People v. Long Beach*, 51 Cal.2d 875, 338 P.2d 177 (1959); and development of public playgrounds and parks, *Los Angeles Athletic Club v. Long Beach*, 128 Cal.App. 427, 17 P.2d 1061 (1932).

[1]Under Cal. Pub. Res. Code § 6307 the State Lands Commission can terminate the public trust *provided* it receives lands of equal or greater value in exchange.

is entitled to be paid for his improvements when the State exercises its trust power to compel other uses (or no use) of his property,[8] the landowner has no right to compensation for the value of his land. Although he retains legal title to his lands notwithstanding the State's exercise of the trust, this title confers none of the incidents of property ownership, save the obligation to pay taxes.

Given the respective rights of the State and the landowner in trust-encumbered lands, it is the State that effectively owns lands that are subject to the public trust easement. The fee owner's "title,'" such as it is, is a title revocable at the will of the State. He possesses what amounts to a mere license to use his lands at the pleasure of the State.

B. The Decision Creates Instability In Title to 8½ Million Acres of Federally-Patented Mexican Land Grants

Our concern with the California court decision stems also from the vast quantity of lands affected by the ruling. Title to over 8½ million acres of California land is based on federally-patented Mexican land grants.[9] Although the Mexican government did not regularly convey beaches, bays, or navigable rivers and lakes into private ownership, shallow lagoons, tidal sloughs, small streams and ponds were often included within Mexican grants. Under the decision below, these areas are burdened by the public trust easement.

Because Mexican grants included much of the most desirable land in California, many wetlands within these grants

---

[8]Cal. Pub. Res. Code § 6312.

[9]Cowan, R., *Ranchos of California* (1977). See Exhibit 1 to the CLTA brief in support of the petition for writ of certiorari, a map prepared by the United States Department of Interior in 1885 depicting confirmed Mexican land grants in California. The Mexican grants are highlighted in green.

have been filled and extensively developed. The Ballona Lagoon involved in this case is a good example. It is now known as Marina Del Rey and is the site of substantial improvements consisting of private marinas, single-family residences, high-rise condominiums, office buildings and commercial complexes.[10] Comparable developed former wetlands exist in Mexican land grants along the coast in cities such as San Diego, Oceanside, Huntington Beach, Laguna Beach, Long Beach, Santa Monica, Santa Barbara, Santa Cruz, Oakland and San Francisco.

The State of California and the City of Los Angeles contended in the proceedings below that such filled and improved former wetlands were subject to the public trust easement. As amicus curiae before the California Supreme Court, CLTA urged that these contentions be rejected so that the status of title to filled and improved lands would not be clouded and further litigation could be avoided. The court's rejection of this request was a clear invitation to the State to pursue its claims that the public trust easement exists over filled and improved lands.

The adverse ramifications of the California court's opinion extend beyond the wetlands and former wetlands included within Mexican land grants. If the public trust easement was unaffected by the confirmation proceedings conducted pursuant to the 1851 Act, it follows that other public property rights recognized under Mexican law may likewise have survived the United States' issuance of an unqualified patent. In fact, the court below suggested that *all* public rights, not simply the public trust, were reserved

---

[10]See Exhibit 2 to the CLTA amicus brief in support of the Petition for Writ of Certiorari which depicts the location of the "inner bay" shown on the map of the Rancho Ballona in relationship to existing lands and improvements in Marina Del Rey.

by the Mexican government in the Rancho Ballona grant.[11] If this was the case, and we strongly doubt that it was,[12] then there is virtually no limit to the Mexican public property rights to which even uplands within Mexican land grants may be subject.[13] Moreover, if, as the court below found, the factual predicates of United States land department decisions are open for reconsideration with the most meager justification,[14] the stability of federally-patented

---

[11]"In the grant of the Rancho Ballona to the Machados and Talamantes, it was provided that the grantees 'may enclose it without prejudice to the traversing roads and servitudes.' An expert on the law of Mexico who testified on behalf of defendants stated that the purpose of this language was to preserve 'the rights of the public . . . in the conveyance of large tracts of land by the authorities.' Thus, when California was ceded by Mexico, the title of defendants' predecessors was subject to the interests of the public in the tidelands and included in the grant." 31 Cal.3d at 297, 644 P.2d at 797. (footnotes omitted.)

[12]The reservation of "traversing roads and servitudes" was standard in virtually all Mexican grants. This Court has held that no broad meaning can be assigned to this language. *Barker v Harvey*, 181 U.S. 481, 495-499 (1901); *United States v. Corona Beach Co.*, 255 U.S. 472, 485-486 (1921).

[13]For instance, Laws III and VI of Title XXVIII of *Las Siete Partidas*, the cited basis for the court's conclusion that a public trust existed under Mexican law, also recognize public ownership of "public highways," "harbors," "rainwater" and "air."

[14]The California court found an ambiguity in the Rancho Ballona patent—the existence of an "inner bay" on the survey incorporated in the patent—which purportedly justified reconsidering whether the inner bay was an arm of the sea. Admittedly, there was some doubt in the grant confirmation proceedings as to the character of the "inner bay." However this uncertainty is precisely what led the General Land Office to make a determination that the area was not an arm of the sea. If the inner bay *was* an arm of the sea, then it would not even have been part of the rancho since the western boundary of the rancho was the "seashore." Thus, there is a fundamental inconsistency in the court's recognition that the inner bay was included within the rancho but was nonetheless an arm of the sea.

land titles would be seriously undermined. Any party asserting an interest in the patented land could compel the grantee to re-establish his right to a patent and the correctness of the decision of the United States land department. The grantee could find his claim recognized in one suit and rejected in another, solely because different tribunals reached different conclusions regarding whether the evidence justified the land department's decision to issue a patent. Title would be made to depend, not on the integrity of the federal patent, but on the varying perceptions of different tribunals. The result would be endless upheaval in land titles and ruinous litigation.[15]

C. The Decision Sanctions Further Extensions of the Public Trust by Rejecting the Boundaries of State Sovereign Ownership as a Limitation on the Scope of the Trust

Our concern with the decision below also arises from the court's rejection of the proposition that the scope of the public trust easement is necessarily limited to the beds of navigable waters that California acquired upon statehood by virtue of its sovereignty. If the boundaries of state sovereign ownership do not define the maximum extent of the trust, then there exists no barrier to further extensions of this paramount public property right.

The court below dismissed the fact that all prior public trust cases involved sovereign state lands as mere coincidence. It is not. Historically, the public trust existed precisely *because* of sovereign ownership of the beds of navigable waters.

---

[15]It is for this very reason that it has long been held that decisions of the General Land Office on questions of fact within its jurisdiction are final and unassailable in any collateral proceeding. *Heath v. Wallace*, 138 U.S. 573 (1891); *French v. Fyan*, 93 U.S. (3 Otto) 169 (1876); *Johnson v. Drew*, 171 U.S. 94 (1898); *Steel v. St. Louis Smelting & Refining Co.*, 106 U.S. (16 Otto) 447 (1882).

The public trust doctrine arose under English common law. The Crown's title to the beds of navigable waterways was a title held for the common benefit of the people.[16] The common law principle was adopted in this country. *Shively v. Bowlby*, 152 U.S. 1 (1894). It early became settled that "[W]hen the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use. . . ." *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

Consistent with the trust capacity in which a state holds title to the beds of navigable waters, such lands may not be conveyed into private ownership in a manner that would substantially interfere with the public's right of commerce, navigation and fishing in the remaining waters. *Id.* These restrictions on the power of a state to alienate trust property *are* the public trust doctrine. The doctrine acts as a *limitation* upon a state's right to transfer property. The public trust does not "convey" an ownership interest in land to the state; it necessarily presumes that the state already owns—or once owned—the property in question.

Historically, then, the public trust was tied to sovereign title. Navigability was an essential element of this trust because only the beds of navigable bodies of water passed to a state upon admission to the Union. *Shively v. Bowlby*, 152 U.S. 1 (1894). If a body of water was not navigable,

---

[16] *Attorney General v. Richards*, 8 Anst. (Eng.) 603 (1795); *Parmeter v. Attorney General*, 10 Price (Eng.) 418 (1813); Hale, *De Jure Maris* (c. 1670) Ch. IV, VI, Reprinted in Hargraves, "A Collection of Tracts Relative to the Law of England" (1788).

title to its bed remained in the United States. *United States v. Utah*, 282 U.S. 64 (1931). Determining whether a state acquired title to a waterbody upon admission to the Union is a question of federal law,[17] to be resolved by application of the federal test of navigability.[18] The federal test of navigability has provided reasonable and time-tested criteria for ascertaining what lands may be subject to the trust.

By rejecting the proposition that the public trust is an incident of title and holding that Mexican law is the source of the trust, the California court has also rejected navigability as the criterion for ascertaining the extent of the public trust easement. If the public trust is not an incident of title, and if civil law, not common law, is the origin of the trust, no inherent requirement of navigability exists. Laws III and VI of Title XXVIII of *Las Siete Partidas*, the cited basis for the state court's conclusion that a public trust easement existed under Mexican law, contain no reference to navigability. Is the trust still limited to "navigable" waters as determined by the federal test? Is it limited to waters that are navigable under some more expansive civil law test? Could it possibly extend to all waters regardless of navigability? Even assuming that

---

[17]*State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1972); *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982); *United States v. Oregon*, 295 U.S. 1 (1935).

[18]The test of navigability was defined by this Court in *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) as follows:

> The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. . . .

some requirement of navigability exists, what is the boundary of a navigable waterbody subject to the trust? Is it the shoreline as defined by common law, or as defined more expansively by civil law?[19] In short, it is not clear what limitations, if any, exist on the extent of the waters that may be subject to the onerous public trust servitude, or even whether the public trust is necessarily limited to waters at all.[20] What *is* clear is that when lands are brought within the ever-expanding reach of the public trust the State may acquire essential property rights without payment of compensation.

We are not being alarmist in our concern that without the constraints afforded by sovereign title, there is no effective limit on the power of the State to usurp property under the guise of the public trust easement. The State's campaign to extend the reach of the public trust is increasingly aggressive and now encompasses lands comprising part of the public domain retained by the United States after confirmation of the Mexican land grants.[21] It is

---

[19]Under common law, the shoreline is the line reached by the ordinary high tides, whereas under civil law the shore extends to the highest wash of the waves. *United States v. Pacheco*, 69 U.S. 587 (1865). The distinction is critical in marshland areas where the landward edge of the marsh typically coincides with the civil law shoreline but the bayward edge tracks the shoreline under common law. Bordering San Francisco Bay, for instance, there are 60,000 acres of marshlands and former marshlands.

[20]See n. 13, *supra*.

[21]In pending litigation the State claims that lands granted by the United States to the State as "swamp and overflowed" lands pursuant to the Arkansas Swamp Act, Act of September 28, 1850, 9 Stat. 519, are actually tidelands burdened by the public trust easement. *State of California v. Leslie Salt Co.*, Alameda County Superior Court No. 463631-9 (Consolidated). This claim is made notwithstanding the fact that the State applied for and accepted a federal swamp and overflowed patent to these lands which, of course, would have been unnecessary had they constituted tidelands acquired by the State automatically upon statehood.

not without justification that the State concludes that such claims will be favorably received by a majority of the California Supreme Court. In the last three years that court has sanctioned unprecedented expansions in the scope of this paramount public property right.[22] Moreover, after the opinion below was rendered, the California court confirmed our fear that further expansions of the trust were imminent by holding that lands that are *not* navigable under the federal test are nonetheless subject to the servitude.[23] Having declared in the decision below that the payment of compensation for the right to improve private lands is against the "policy" of the State,[23a] the California Supreme Court cannot reasonably be expected to exercise self-restraint when presented with the next opportunity to bring additional lands within the reach of the public trust. We fear that unless checked by this Court the erosion of the property rights of California citizens will continue unabated.

II

SUMMARY OF ARGUMENT

The purpose of the 1851 Act was to define and settle the respective property interests of the Mexican grantees and the United States, as successor to the Mexican government, in the ceded territory. The Act was not designed to resolve conflicting claims *among* Mexican grantees or to fix for all time the rights that attached to the ownership of property once the Mexican grants were confirmed. Accordingly, under Section 15 of the Act, the patent that issued as the

---

[22]See discussion at pp. 25-26, *infra*.

[23]In *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 435, 658 P.2d 709, n.17 (1983) the court stated that "A waterway usable for pleasure boating is nevertheless a navigable waterway and protected by the public trust." Under the federal test of navigability, the waterway must be useful for commercial navigation.

[23a]31 Cal.3d at 303, 644 P.2d at 801.

culmination of the confirmation proceedings was made conclusive on the grantee, the United States and their respective successors, but not upon "third parties," that is, other Mexican grantees holding conflicting claims.

The central error of the California court was its failure to appreciate the ramifications of the fact that California claims its public trust easement as a successor to the United States and not as a third party. In reasoning that the patent to the Rancho Ballona did not terminate the United States' interest in the lands, the court, and respondents herein, rely upon a line of cases in which patents issued pursuant to the 1851 Act were held to merely confirm the rights which the Mexican grantees acquired under Mexican law. These cases are inapplicable for two reasons. First, they typically involve disputes between parties holding confirmed Mexican land grants and are, therefore, properly characterized as "third party cases" as to which the patent is not conclusive under Section 15 of the 1851 Act. Second, all the cited cases involve controversies over the water rights that the Mexican grantees acquired by virtue of their confirmed land grants. The Act was not intended to define all of the rights attaching to property ownership once a grant was confirmed, but only to settle controversies such as that here at issue—disputes over the respective property interests of the Mexican grantees and the United States or its successors. Thus a patent issued under the 1851 Act is properly characterized as "confirmatory" with respect to disputes among Mexican grantees or over rights attendant to property ownership. But with regard to the United States and its successors, including the State of California, the patent is conclusive as to all their property interests in the patented lands.

Federal law governs the outcome of this case because the effect of a federal patent issued under a federal statute upon rights claimed to be derived from the United States is at issue. Nonetheless, respondents State of California

and City of Los Angeles argue that state law controls whether or not California received a public trust interest in Ballona Lagoon. They are not correct. However, even assuming that state law legitimately plays some role in this case, the decision below cannot stand because it constitutes sudden and unforeseeable change in rules of property established by a long line of decisions of the California Supreme Court.

Until the decision below, three propositions, each of which is dispositive of this case, were firmly established by decisions of the California Supreme Court: (1) the State acquired no interest by virtue of its sovereignty in lands granted by the Mexican government; (2) a patent issued pursuant to the 1851 Act terminated any interest of the United States in the patented lands and was conclusive against the State; and (3) claims not raised in the grant confirmation proceedings were barred from future assertion. The California court's decision departs unexpectedly from each of these fundamental premises of property law. Under the decisions of this Court, when such a radical change in law serves to appropriate valuable property rights, it is unconstitutional without the tender of just compensation.

The California court's sudden reversal of these settled rules of property law also violates the doctrine that in matters affecting titles to real property, the law should be stable, predictable and not subject to significant change. Thousands of landowners have invested millions of dollars in reliance upon rules of law announced and often reiterated in decisions of the California Supreme Court. That court's attempt to rewrite 125 years of legal history should not be condoned.

III

ARGUMENT

A. As Against the State of California, a Patent Issued Pursuant to the 1851 Act is Not Merely Confirmatory, But Conclusive

Under Section 15 of the 1851 Act, a patent to a Mexican land grant is conclusive against the grantee, the United States and their respective successors. However, that patent is not binding on "third parties" claiming superior rights from the Mexican government acquired before the cession of California. The central error of the California Supreme Court was its failure to appreciate the ramifications of the fact that California claims its public trust easement as a successor to the United States. This error led the court (and respondents herein) to rely upon an irrelevant line of "third party cases" holding that patents issued pursuant to the 1851 Act are merely confirmatory of property rights which the Mexican grantees possessed under Mexican law.

As detailed in the brief of Petitioner Summa Corporation, the purpose of the 1851 Act was to settle and define the respective interests of the Mexican grantees and the United States in the ceded territory. Under the Treaty of Guadalupe Hidalgo, the United States stood in the place of the Mexican government and succeeded to all property rights which Mexico had not previously conveyed to private parties. Until the United States could ascertain the extent and nature of the Mexican-based property rights that it was bound to respect under the treaty, doubt would remain as to what property interests the United States had received from the Mexican government and, accordingly, what interests the United States could pass to its successors.

The 1851 Act was not intended to resolve conflicting claims among grantees of the Mexican government or to fix for all time the rights attached to property owner-

ship once a grant was confirmed. It was not uncommon for two or more Mexican grantees to file claims covering the same land with the Board of Land Commissioners and for these claims to be processed simultaneously by the Board. In fact, conflicting claims to the same land were sometimes confirmed by the Board and patented by the United States. *Rodriguez v. United States*, 68 U.S. (1 Wall.) 582 (1864). The "third party" exception in Section 15 of the Act reflected the intent to leave these conflicting claims for future resolution. The "third parties" referred to in Section 15 were parties claiming superior rights from Mexico that antedated the cession. *Knight v. United Land Assn.*, 142 U.S. 161, 189 (1891); *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491 (1866). Because the patent which issued as a result of the confirmation proceedings was not binding on these third parties, their rights were protected. Thus, so long as grantees submitted their claims to the Board within the two year period prescribed by Section 13 of the 1851 Act, and the claims were ultimately confirmed, they were not precluded from litigating with other parties deriving title from confirmed Mexican land grants over the boundaries of the lands described in the patents,[24] the rights attendant to property ownership,[25] or even the validity of the grants from Mexico.[26]

The situation was otherwise in disputes with the United States or its successors. The federal patent was, under the express provisions of Section 15 of the 1851 Act, conclusive against the United States. The binding effect of the patent against the United States and its successors was described

---

[24] *Waterman v. Smith*, 13 Cal. 373 (1859); *Miller v. Dale*, 92 U.S. (2 Otto) 473 (1876); *Henshaw v. Bissell*, 85 U.S. (18 Wall.) 255 (1873).

[25] *Crystal Springs Land & Water Co. v. Los Angeles*, 177 U.S. 169 (1900); *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U.S. 217 (1910).

[26] *California Powder Works v. Davis*, 151 U.S. 389 (1893).

by this Court in *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 492 (1866) as follows:

> As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie.[27]

It follows from the foregoing that the patent to the Rancho Ballona, which did not reserve any public trust easement, is dispositive of this case. That patent is a complete bar to the assertion that the United States retained any property rights in the patented lands. The proceedings conducted pursuant to the 1851 Act were intended to define the full extent of the property rights which the United States acquired from Mexico. The United States was a party to the proceedings before the Board of Land Commissioners, and was authorized, indeed required, to protect public property rights in the ceded lands. In fact, an agent, skilled in Spanish and versed in Mexican law, was designated to contest the claims of Mexican grantees on behalf of the United States. 1851 Act, Section 4. Every opportunity was given to the United States to present evidence in support of its claims. The Board had judicial powers to subpoena witnesses, administer oaths, and hear evidence and was required to examine the facts and law produced on behalf of both the claimant the United States and decide the validity of the claim. 1851 Act, Sections 1-8. The United States could, but did not, raise any claim that tidelands within the Rancho Ballona were subject to a paramount

---

[27] *See also United States v. Coronado Beach Co.*, 255 U.S. 472, 487-488 (1921); *San Francisco v. LeRoy*, 138 U.S. 656, 670-671 (1891); *Knight v. United Land Assn.*, 142 U.S. 161, 184 (1891).

public property right.[28] The patent issued without any such reservation. It is, by the express provisions of Section 15, conclusive against the United States.[29]

It is likewise binding on the State which claims in strict subordination to the United States as a successor in interest. The State cannot claim exemption from the conclusive effect of the patent on the ground that it is a third party protected under the provisions of Section 15. It has long been settled that because the term "third parties" refers to claimants who had superior rights under Mexican law which antedated the cession, the State of California, which did not exist at that time, can claim no protection as a third party. *Knight v. United Land Assn.*, 142 U.S. 161, 184 (1891).

According to the court below, the State acquired its public trust easement from the United States and not as a third party. Nonetheless, both that court and respondents cite what are properly characterized as "third party

---

[28]The United States conducted an extensive investigation of Mexican property law prior to adopting the 1851 Act. Jones, *Report on the Subject of Land Titles in California*, (1850). Yet we are aware of no instance where the United States claimed that a navigational servitude or comparable public property right had been implicitly reserved in Mexican grants. The failure to present such a claim strongly suggests that no public trust easement was recognized in Mexican law.

[29]The question of whether the federal patent was subject to an implicit reservation of the federal navigational servitude is not an issue in this case. However, because this servitude is a substantial property interest which deprives the landowner of the "right to exclude," which is "universally held to be a fundamental element of the property right," *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979), we see no reason for exempting this servitude from the conclusive effect of the federal patent. This is not to say, however, that the United States cannot exercise its broad regulatory powers under the Commerce Clause over Ballona Lagoon. *Id.*

cases"[30] to support the conclusion that the patent acted merely as a confirmation of the Mexican grantees' rights under Mexican law and did not terminate all interest of the United States in the patented lands. We do not disagree with the holdings of those cases. However, they are not applicable here.

None of the authorities relied upon by the California court and cited by respondents involved conflicting claims between a confirmed Mexican grantee and the United States or its successor. Rather, with one exception,[31] these cases were disputes *among* Mexican grantees whose claims had been confirmed and patented under the 1851 Act. Moreover, all of the cases concerned the *water rights* which the patentees acquired by virtue of their grants from the Mexican government. We readily acknowledge that the 1851 Act did not purport to define and fix for the future *all* rights attaching to property ownership once a grantee received a federal patent. After the patents were issued, the patentees were left to litigate among themselves in state courts the nature and scope of their property rights. To this extent, then, a patent issued pursuant to the 1851 Act is properly characterized as "confirmatory" of whatever rights the claimant had acquired under Mexican law.

But this is not to say that California, as a successor to the United States, can now claim that it retains property

---

[30] *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339 (1909); *Crystal Springs Land & Water Co. v. Los Angeles*, 177 U.S. 169 (1900); *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U.S. 217 (1910); *Devine v. Los Angeles*, 202 U.S. 313 (1906); *Hooker v. Los Angeles*, 188 U.S. 314 (1903).

[31] *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339 (1909), in which a Mexican grantee holding a federal confirmatory patent sought to enjoin the diversion of water by a party who held no title to land but who claimed rights to water use under Arizona's water appropriation laws.

interests under Mexican law that were never mentioned in the proceedings before the Board or district court and that are nowhere reflected in the conclusive patent which issued as the culmination of those proceedings. If California can assert that it is entitled under Mexican law to a pervasive easement in the patented lands, what bar exists to a like claim that lands retained by the United States are burdened with implied easements arising under Mexican law and running in favor of successors to the patentees? Congress sought to lay to rest precisely such claims when it adopted the 1851 Act. The respective property interests of the grantees and the United States in the lands ceded by Mexico were fixed, once and for all, by the proceedings conducted pursuant to the 1851 Act. It is too late now for California to claim otherwise.

B. The Decision Below Unconstitutionally Appropriates Valuable Property Rights through an Abrupt and Unforeseeable Change In Real Property Law

This case turns on the effect of a federal patent issued under a federal statute upon rights claimed to be derived from the United States. In such a case, we believe it is beyond question that federal law is controlling.[22] We further believe that the federal issues presented have already been resolved by this Court. *Knight v. United Land Assn.*, 142 U.S. 161 (1891); *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921); *San Francisco v. LeRoy*, 138 U.S. 656 (1891); *United States v. Title Insurance & Trust Co.*, 265

---

[22]In contending that this case is governed by state law, respondents mistakenly rely on *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U.S. 217 (1910) and related cases holding that disputes over water rights between parties holding confirmed Mexican land grants are to be resolved in accordance with local law. As discussed at pp. 16-19, *supra*, this line of authorities is inapplicable here because no property right derived from the United States and subject to the conclusiveness provisions of Section 15 of the 1851 Act was involved in any of these cases.

U.S. 472 (1924); *Barker v. Harvey*, 181 U.S. 481 (1901). However, respondents argue that the state court opinion is not grounded in federal law but merely announces state property law principles. Regardless of how the California court opinion is interpreted, the decision cannot stand because it unconstitutionally appropriates valuable property rights by suddenly and radically departing from rules long ago established by decisions of the California Supreme Court.

This case did not raise issues of first impression for the California Supreme Court. Starting even before this Court had considered the issues raised by this case, the California Supreme Court recognized:

1. That California did not receive any sovereign interest in the beds of navigable waters included within federally-patented Mexican land grants. *Teschemacher v. Thompson*, 18 Cal. 11 (1861); *Leese v. Clark*, 18 Cal. 535 (1861); *People v. San Francisco*, 75 Cal. 388, 17 P. 522 (1888).

2. That patents issued pursuant to the 1851 Act conveyed whatever interest the United States possessed in the premises and conclusively established the title of the grantee as against claims by the State. *Leese v. Clark*, 18 Cal. 535 (1861); *Waterman v. Smith*, 13 Cal. 373 (1859); *Moore v. Wilkinson*, 13 Cal. 478 (1859); *Moore v. Smaw*, 17 Cal. 199 (1861); *Chipley v. Farris*, 45 Cal. 527 (1873); *People v. San Francisco*, 75 Cal. 388, 17 P. 522 (1888); *Teschemacher v. Thompson*, 18 Cal. 11 (1861); *Cassidy v. Carr*, 48 Cal. 339 (1874); *Los Angeles Farming & Milling Co. v. Thompson*, 117 Cal. 594, 49 P. 714 (1897), *aff'd sub nom. Thompson v. Los Angeles Farming & Milling Co.*, 180 U.S. 71 (1901).

3. That claims not raised in the confirmation proceedings conducted pursuant to the 1851 Act were

barred from future assertion. *Estrada v. Murphy*, 19 Cal. 248 (1861); *Harvey v. Baker*, 126 Cal. 262, 58 P. 692 (1899) *aff'd sub nom. Barker v. Harvey*, 181 U.S. 481 (1901).

The leading case is *Teschemacher v. Thompson*, decided 122 years ago. That case squarely presented the question of whether tidelands that had been included in a confirmatory patent to a Mexican rancho grant belonged to the grantee or passed to the State of California by reason of its sovereignty. The court ruled in favor of the grantee:

> The United States, upon the cession of the country, took the premises charged with the equitable claim of the Mexican grantees, and have since perfected the claim into a perfect title. But for such equitable claim the United States would have held the title in trust for the new State, but, the claim existing, the State and all other parties must hold in subordination to the action of the Government respecting it. The right and power of the Government to protect and thus perfect the equitable claim were superior, as we have shown, to any subsequently acquired rights or claims of the State or of individuals. 18 Cal. at 27-28.

The holding in the *Teschemacher* case was followed in *Leese v. Clark*, 18 Cal. 535 (1861). The court there considered the effect of a patent issued pursuant to the 1851 Act:

> *It [the patent] passes whatever interest the United States may then have possessed in the premises. It operates in consequence as an absolute bar to all claims under the United States having their origin subsequent to the petition.*
>
> But the patent has a still further operation and effect. It is not merely a deed of the United States, conveying whatever interest they may have held in the premises at the institution of proceedings before

> the Land Commission. It is also a record of the Government, showing its action and judgment with respect to the title of the patentees at the date of the cession. . . . This instrument, as we have stated, is the record of the Government upon the title of the patentee to the land described therein, declaring the validity of that title and that it righfully [sic] attaches to the land. *Upon all the matters of fact and law essential to authorize its issuance, it imports absolute verity; and it can only be vacated and set aside by direct proceedings instituted by the Government, or by parties acting in the name and by the authority of the Government. Until thus vacated it is conclusive, not only as between the patentee and the Government, but between parties claiming in privity with either by title subsequent.*
> 18 Cal. at 571-572. (citations omitted, emphasis added.)

These conclusions were often reiterated, even where the State was a party and raised arguments virtually identical to those advanced here. In *People v. San Francisco,* 75 Cal. 388, 17 P. 522 (1888) the State claimed that the Mexican government was without power to convey tidelands and that a patent to the pueblo of San Francisco improperly included such lands. The court responded:

> If the Mexican government had power to grant lands below the line of the ordinary tides, the state of California, upon its admission into the Union, became the owner of such tide-lands only as had not been previously disposed of by Mexico. No authority has been cited in support of the statement that, by the law of Mexico, tide-lands could not be included within pueblo lands. And, as the proper department of our government has determined that a survey, which included such lands, conformed to the decree of confirmation, that question cannot be reconsidered here. The land department has power to locate all claims confirmed. It fol-

lows that the state never had any title to the land here in controversy. 75 Cal. at 398, 17 P. at 526.

In the decision below the California court dismissed these authorities, as well as identical rulings by this Court, as holding only that California was barred from claiming *title* to tidelands within patented Mexican grants but not from asserting the existence of the public trust easement. This distinction lacks substance. The public trust easement is the functional equivalent of title, for it vests in the State the right to possess encumbered lands, to compel uses of its choosing, to prescribe who shall be allowed access, or to prevent any beneficial use whatsoever by the fee owner. *See* pp. 3-5 *supra*. As illustrated by the California court's own decision in *Harvey v. Barker*, 126 Cal. 262, 58 P. 692 (1899), *aff'd sub nom. Barker v. Harvey*, 181 U.S. 481 (1901), a right this broad *is* title. In that case the Mission Indians argued that they were not required to present their claim of a right to perpetual occupancy to the Board of Land Commissioners. In rejecting that contention the court stated:

> *If, as claimed, it were a right to possess, occupy and use land, that amounted to a title to property.* It being a title or right to property, whether in fee simple or possessory merely, derived from the Mexican government, under the act of Congress of 1851, as repeatedly held, a claim to that right was required to be presented for confirmation. 126 Cal. at 274, 58 P. at 697. (emphasis added.)

Given the foregoing authorities, the rule that the State possessed no interest, trust or otherwise, in Mexican land grants patented without reservation by the United States was considered firmly embedded in California property law. Title insurers were not alone in this conclusion. By two statutes enacted in 1917 and 1945, the California legislature conveyed to the City of Los Angeles, "all right, title and interest of the State of California held by said State by

virtue of its sovereignty, in and to all the tidelands and submerged lands" within the municipal boundaries.[33] Both statutes except any property held under a Mexican grant.[34] It is not surprising, then, that the State never claimed a reserved public trust easement in Mexican land grants until 1965 when this case commenced. Coincidence and historical accident simply cannot account for the 114 elapsed years between adoption of the 1851 Act and the State's first assertion that it inherited a public trust interest from Mexico. Obviously, *even the State believed it retained no interest, trust or otherwise, in patented Mexican land grants.*

In short, the California Supreme Court's action cannot properly be characterized as the next logical step in defining the scope of the public trust easement. To be sure, the opinion is couched in familiar "public trust" vocabulary, cites some classic "public trust" cases, and purports to be but a new application of traditional "public trust" principles. But the only California cases which bear any real resemblance to the decision below are those recent pronouncements where settled rules of property were similarly discarded in order to extend the reach of the public trust easement. In *Berkeley v. Superior Court,* 26 Cal.3d 515, 606 P.2d 362, *cert. denied,* 449 U.S. 48 (1980) the California Supreme Court overruled its decision in *Knudson v. Kearney,* 171 Cal. 250, 152 P. 541 (1915) and held that tidelands surrounding San Francisco Bay that were sold without qualification by the State pursuant to an 1872 statute authorizing the lands to be cut off from navigation and

---

[33] 1917 Cal.Stat. ch. 77, p.89; 1945 Cal.Stat. ch. 1513, p.2826.

[34] The 1945 grant contained the following proviso: "excepting any property held under, through or from a Mexican grant or patent." The 1917 grant similarly provided that ". . . nothing contained herein shall in any way affect any property held or claimed under, through or from a Mexican grant or patent therefor within the present boundaries and jurisdiction of said city."

filled were subject to an implicit reservation of the public trust easement. In *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, *cert. denied* 454 U.S. 1094 (1981), the court extended the public trust servitude to lands between the high and low water lines in navigable lakes notwithstanding the provisions of California Civil Code section 830 and numerous court decisions limiting any state interest to low water. Most recently in *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 658 P.2d 709 (1983) the court held that streams navigable only for pleasure-boating purposes (and which, consequently, California did not acquire under the federal test of navigability) were subject to this paramount public property right.

The impact of such reversals in established rules of property on the investment-backed expectations of California citizens is severe. The rule that Mexican land grants were free of the public trust servitude was relied upon by thousands of landowners as well as by title insurers. The intensive development of the Marina Del Rey area involved in this case amply illustrates that substantial investments have been made on the reasonable assumption that no such encumbrance existed. By the decision below, we are now advised that tidelands within Mexican land grants have *always* been subject to this heretofore unasserted and unannounced public property right.

The federal constitutional prohibitions against taking property without due process of law and payment of just compensation cannot be so easily circumvented. In *Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring) this Court recognized that judicial action which appropriates valuable property rights under the guise of holding that such rights never existed constitutes an unconstitutional taking:

> To the extent that the decision of the Supreme Court of Washington on that issue [of the ownership of

> accreted lands] arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. 389 U.S. at 296-297.

Recently, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) this Court found an unconstitutional taking in circumstances very similar to those of this case. The property there at issue, Kuapa Pond, was also a shallow lagoon which in its natural state was separated from the ocean by a barrier beach. Under established rules of Hawaii law, the pond was considered private property. With the acquiescence of the United States Army Corps of Engineers, private parties spent millions of dollars to dredge and fill the pond, construct a channel to the ocean and develop a private, marina-style community. The Corps later asserted that the marina was a "navigable water of the United States," that further dredging and filling operations required authorization from the Corps, and that the marina was subject to the federal navigational servitude which created a public right of access.

This Court held that although the marina could be regulated by the Corps, a right of public access could not be appropriated without payment of just compensation because: (1) the pond was shallow in its natural state and not the type of great navigable waterbody traditionally held to be incapable of private ownership; (2) the pond had always been considered private property under Hawaii law; (3) the acquiescence of the Corps in the improvement of the pond had been relied upon by landowners; and (4) the

"right to exclude" the public constituted a fundamental element of private property.

The parallels between the *Kaiser Aetna* case and this litigation are obvious. Ballona Lagoon, in its natural state, was far from a great navigable waterbody. On the contrary, it was described as "pasture" in affidavits submitted to the General Land Office in conjunction with the patenting of the rancho. Its status as private property was unquestioned until the decision below. The failure of the State to assert any reserved public trust easement led landowners to invest millions of dollars in purchasing and improving what they thought was their private property. Finally, the public trust easement is a property interest of even greater magnitude than the right to exclude at issue in *Kaiser Aetna*."[35]

In sum, the attempt of the California court to rewrite 125 years of legal history is an unconstitutional taking of valuable property rights without due process or just compensation. It is, as well, violative of the doctrine that rules of property law should be stable, predictable and not subject to radical change except for the most persuasive of reasons."[36] *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979). In *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924) this Court gave effect to this doctrine by declining

---

[35]Virtually the only difference between *Kaiser Aetna* and this case is that the attempted taking was there effected by administrative, rather than judicial, action. This Court has held, however, that courts are not immune from claims that their decisions constitute an unconstitutional taking without due process of law. *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544 (1905); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944); *Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring).

[36]Here, no persuasive reasons exist to sanction a radical departure from established California property law. Wetlands in California are already subject to an impressive list of federal and state regulatory schemes designed to prevent unnecessary development of ecologically sensitive lands. Rivers and Harbors Act of 1899, 33

the invitation of the Mission Indians to upset titles patented under the 1851 Act:

> *Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change.* Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective, and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. 265 U.S. at 486-487. (citations omitted, emphasis added).

The wisdom of this doctrine is apparent. We submit that in this case the Court should likewise decline to sanction the sudden and unforeseeable reversal of fundamental rules of property law long ago established by decisions of the California Supreme Court.

U.S.C. § 402 *et seq.*; Federal Water Pollution Control Act. 33 U.S.C. § 1251 *et seq.*; Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*; Maritime Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. § 1431 *et seq.*; Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*; National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; California Environmental Quality Act, Pub. Res. Code § 21000, *et seq.*; California Wetlands Preservation Act, Pub. Res. Code § 5810 *et seq.*; California Coastal Act, Pub. Res. Code § 30000 *et seq.*

IV

CONCLUSION

For all of the foregoing reasons, the judgment of the Supreme Court of California should be reversed and the case remanded for further proceedings consistent with the decision of this Court.

Respectfully submitted,

EDGAR B. WASHBURN
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
(415) 981-2121
Counsel for Amicus Curiae

Of Counsel:
NANCY J. STIVERS
Washburn & Kemp
One Embarcadero Center
Suite 2407
San Francisco, CA 94111
(415) 981-2121

June, 1983